Supreme Court, U.S.
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No. 96-1672

In The

Supreme Court of the United States

October Term, 1996

THE PHILLIPS COMPANY,
a Colorado Limited Partnership,

Petitioner,

v.

SOUTHERN PACIFIC RAIL CORPORATION, a Delaware corporation, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, INC., a Delaware corporation, and SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner's "questions presented" do not reflect the holdings or rationale of either the District Court or the Tenth Circuit. This case presents a single issue:

> Does 43 U.S.C. § 912 empower a District Court to declare an involuntary abandonment of a federally granted railroad right-of-way without the ICC permission required under 49 U.S.C. § 10903(a) for the termination of rail service over the right-of-way?

There is no reason for this Court to review the decisions of the Interstate Commerce Commission (the "ICC"),[1] the District Court and the Tenth Circuit Court of Appeals that one federal statute should not be interpreted to defeat the exclusive and plenary jurisdiction granted to the ICC under another.

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[1] The ICC was abolished by the ICC Termination Act of 1995 effective January 1, 1996, and its authority under 49 U.S.C. § 10903(a) transferred to the Surface Transportation Board. Because the ICC was in existence at all times relevant to this case, the ICC is referred to in this brief in the present tense and the transfer of authority ignored.

LIST OF PARTIES

The Petition does not name all the parties and misstates the relationships of respondents.

Southern Pacific Transportation Company ("SP Trans") became a defendant when the District Court granted its petition to intervene by Minute Order dated June 7, 1995 (Aplt. App. at 31). During the proceedings below, the Denver and Rio Grande Western Railroad Company, Inc. ("D&RGW") was a wholly owned subsidiary of SP Trans, which in turn was a wholly owned subsidiary of Southern Pacific Rail Corporation, a Delaware corporation. Subsequent to the proceedings below, Southern Pacific Rail Corporation was merged into UP Holding Company, Inc., a Utah corporation. Following that merger, UP Holding Company, Inc. changed its name to Southern Pacific Rail Corporation. Southern Pacific Rail Corporation, a Utah corporation, is successor in interest to Southern Pacific Rail Corporation, a Delaware corporation, named as a defendant in this case.

Respondents are now all wholly owned subsidiaries of Union Pacific Corporation, a publicly traded corporation. To the extent petitioner's description of the corporate history of respondents is different than set forth above, it is wrong and unsupported by the record.

Respondents have the following non-wholly owned subsidiaries: Central California Traction Company; Denver Union Terminal Railway Co.; The Ogden Union Railway & Depot Co.; Portland Terminal Railroad Company; Portland Traction Company; San Marco Pipeline

LIST OF PARTIES – Continued

Company; St. Louis Southwestern Railway Co.; Sunset Railway Company; TTX Company.

The Phillips Company is a Colorado limited partnership that appears to own land adjacent to the right-of-way in dispute. The record in this case does not confirm the additional information about The Phillips Company offered by petitioner.

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43 U.S.C. § 912 (Section 912) ..... *passim*

49 U.S.C. § 10903(a) (Section 10903) ..... *passim*

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OPINIONS BELOW

Petitioner includes the text of 43 U.S.C. § 912 ("Section 912") in the Appendix to its petition. Petitioner did not include the text of 16 U.S.C. § 1248(c) that amended Section 912 effective October 4, 1988 to remove the provision under which petitioner claims. The text of 16 U.S.C. § 1248(c) is Appendix A to this brief.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The General Railroad Right-of-Way Act of 1875 (43 U.S.C. § 934-§ 939) (the "1875 Act"), Section 912, 16 U.S.C. § 1248(c) and 49 U.S.C. § 10903(a) ("Section 10903") are relevant to this case.

The Fifth Amendment to the United States Constitution is not relevant to this case. No private property has been taken for public use. Petitioner made no claim for compensation under the Fifth Amendment in any proceeding below.

16 U.S.C. § 1247(d) is not relevant to this case. No action affecting the right-of-way in question has been taken under 16 U.S.C. § 1247(d).

STATEMENT OF THE CASE

The ICC, the District Court and the Tenth Circuit have all ruled, without reaching any other factual allegation advanced by petitioner, that when a railroad lacks the required regulatory permission under Section 10903

to cease rail service permanently, Section 912 cannot be interpreted to terminate involuntarily an 1875 Act right-of-way that is necessary to provide that rail service. Respect for the ICC's broad jurisdiction to protect the public demands this outcome.

It is undisputed in this case that the right-of-way at issue was granted under the 1875 Act, that petitioner's claim is based on the provisions of Section 912 and that the rail lines over the right-of-way in question are subject to ICC jurisdiction. It is also undisputed that the ICC has never granted permission under Section 10903 to terminate rail service over the subject right-of-way. The decision of the Tenth Circuit that petitioner asks this Court to review, and the underlying decisions of the ICC and the District Court which the Tenth Circuit upheld, are all based upon those four undisputed facts.

Portions of petitioner's statement of the case are correct. In 1993 petitioner filed an action in the District Court seeking a declaration under Section 912 that a portion of the 1875 Act right-of-way for the Aspen Branch had been abandoned and a declaration that the abandoned portion of the right-of-way belonged to petitioner. (Aplt. App. at 35) Petitioner amended its pleading to expand the portion of the Aspen Branch to which its claim related and to seek certification of a plaintiff class of similarly situated adjacent landowners. (Aplt. App. at 4) Although the District Court allowed the amendment to describe a plaintiff class, no further action concerning class certification occurred prior to the District Court's dismissal of petitioner's claim by summary judgment.

Petitioner did not commence an adverse abandonment proceeding before the ICC. In petitioner's Written Objection to the Magistrate Judge's recommendation that petitioner's claim be dismissed because the ICC had never granted permission to cease service, petitioner suggested that the "issues of abandonment" be referred to the ICC. (Supp. App. at 9) The District Court accepted petitioner's suggestion (Aplt. App. at 136) and in response to the District Court's order of referral, petitioner filed a document captioned "Application for Determination of Abandonment" with the ICC. (Aplt. App. at 139)

Petitioner's filing with the ICC cited the District Court's order of referral, but incorporated substantial portions of the form of petition used to initiate a request for abandonment subject to the exclusive jurisdiction of the ICC under Section 10903. The ICC docketed petitioner's filing as a declaratory order proceeding, as is its procedure. (Aplt. App. at 188). Petitioner never challenged or appealed the ICC's docketing of petitioner's filing as a request for declaratory order. Petitioner should not be heard now to complain about a procedural issue on which petitioner was silent below.

In the declaratory/referral proceeding, the ICC decided, on April 4, 1995, that the D&RGW had not obtained ICC approval under Section 10903 to terminate service and that, without such permission, an abandonment could not take place. (Aplt. App. at 363) The ICC also decided that, because an abandonment could not take place without its permission under Section 10903, it need not consider facts that petitioner alleged indicated abandonment before October 4, 1988.

By Order dated October 2, 1995, the District Court reviewed the ICC decision, adopted the ICC analysis and granted respondents' motion for summary judgment.

The Tenth Circuit decision dated October 16, 1996 approves the interpretation of the ICC and affirms the District Court holding that an abandonment cannot occur under Section 912 without prior ICC permission under Section 10903. The Tenth Circuit also recognized that the amendment to Section 912 eliminated petitioner's expectation of receiving a real estate interest that might revert to the United States by explaining that petitioner would be "hard pressed to assert a present revisionary interest in the right-of-way, in light of 16 U.S.C. § 1248(c)." (Petition Appendix at 19)

The request of petitioner, and others, to reopen the ICC referral proceeding as an adverse abandonment proceeding was denied on February 14, 1997. Finance Docket No. 32518, *The Phillips Company – Petition for Declaratory Order*, STB February 25, 1997. That denial has not been appealed.

REASONS FOR DENYING THE WRIT

The Tenth Circuit's decision in this case neither suggests a split between the Tenth Circuit and other Courts of Appeal nor raises any important question of law. The Tenth Circuit's decision is consistent with a long series of federal and state court decisions concerning the relationship between railroad abandonment of their rights-of-way and pervasive ICC jurisdiction over railroad service. Due to changes in Section 912, the decision has limited

precedential significance. Petitioner's factual assertions, though numerous, are irrelevant to the decision below.

I. There Is No Circuit Court Conflict Between the Tenth Circuit Decision and *Preseault v. United States*

Contrary to petitioner's assertion, the decision of the Tenth Circuit in this case is not in conflict with the decision of the Court of Appeals for the Federal Circuit in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault 96*"). *Preseault 96* arose from different circumstances and addressed different issues.

Preseault 96 arose out of a series of proceedings that includes a "no abandonment" decision to the same effect as the decisions below in this case. In *Trustees of the Diocese of Vermont v. State*, 496 A.2d 151 (1985), the Supreme Court of Vermont held that a court could not declare the right-of-way at issue in *Preseault 96* terminated prior to ICC regulatory permission to cease rail service.

Preseault 96 is a review of a two-part decision of the Court of Federal Claims. In the first paragraph of its second decision, the trial court explained that its initial decision that abandonment had occurred was based on "applying only Vermont common law, without giving federal law, or the relationship of state and federal law any effect." *Preseault v. U.S.*, 27 Fed. Cl. 69 at 71 (1992). A decision that there would have been an abandonment without regard to federal law giving the ICC exclusive jurisdiction is not in conflict with either the decision of the Vermont Supreme Court in the same dispute that the

federal law assumed away by the Court of Claims prevented an abandonment or the decision of the Tenth Circuit in this case to the same effect.

Preseault 96 arose *after* a request to the ICC under Section 10903 that led to rail banking. In this case, no request to the ICC under Section 10903 has ever been made. Based on the theory that adjacent owners lost property rights as a result of rail banking, *Preseault 96* considered a claim for compensation against the United States – a "takings" case. The *Preseault 96* opinion begins with the phrase "[i]n this Takings case." (100 F.3d 1525 at 1529) Although petitioner now alludes to seeking compensation from the United States, that claim was not made in the case below, and no takings issue is available for review in this case.

Thus, *Preseault 96* involves the impact of federal regulation over railroads on a vested, common law property right. This case denies a claim to enforce an expectancy of obtaining a property right under a federal statute that was amended to delete the basis for the claim before the claim was made. This case is an interpretation of Section 912. *Preseault 96* says nothing about the interpretation of Section 912.

Section 912 never conveyed any property right to adjoining landowners. Section 912 was a statutory system for disposing of the property interest of the United States *after* abandonment by a railroad and reversion of the right-of-way to the United States had occurred. The expectation of an adjacent landowner under Section 912 was always subordinate to the prior statutory expectations of a municipality; to use for a "public highway" for

up to a year after a court decree under Section 912; and to any conveyance of the right-of-way validated or confirmed by Congress.

Like any statutory prospect of future benefit, the expectation of an adjacent landowner under Section 912 was also subject to elimination by amendment or repeal of the statute. Congress did precisely that effective October 4, 1988. By 16 U.S.C. § 1248(c), Congress repealed the portion of Section 912 under which petitioner could have received property from the United States, after abandonment and an appropriate court decree. Unlike *Preseault*, which dealt with the consequence of extinction of an established common law property right, in this case no property right was taken from petitioner in the Aspen Branch right-of-way because petitioner never received any property in the first place.

II. There Is No Significant Precedent In This Case Because of the 1988 Change to Section 912

Petitioner's suggestion that the case below raises issues of significance to "hundreds of [sic] not thousands" (Petition at 8) of other landowners is incorrect. Future abandonments cannot put anyone in the same circumstance as petitioner because of the repeal of the portion of Section 912 under which petitioner claims. No abandonment after October 4, 1988 can raise the Section 912 interpretation question that is the sole issue in this case.

Nothing supports petitioner's suggestion that a significant number of claims based on abandonment of federal rights-of-way before October 4, 1988 will suddenly

spring up after having lain unasserted for eight and a half years. Common sense suggests otherwise. Moreover, any such claims could well be time-barred.

III. Ample Precedent Supports the Tenth Circuit's Decision

At all times relevant to this case, Section 10903 said that a railroad may "(1) abandon any part of its railroad lines; or (2) discontinue the operation of all rail transportation over any part of its railroad lines; *only* if the [ICC] finds that the present or future public convenience and necessity require or permit the abandonment." (emphasis added) This Court recognized the exclusive and plenary authority of the ICC over abandonment of "railroad lines" in *Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). There, this Court referred to the Interstate Commerce Act as "among the most pervasive and comprehensive of federal regulatory schemes," *id.* at 318, and held that the exclusive and plenary nature of the ICC's authority to rule on abandonment "is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce." *Id.* at 321.

Respondents cited several decisions recognizing that the ICC's exclusive and plenary authority prevents abandonment of a railroad right-of-way without ICC permission under Section 10903 to cease regulated rail service. *City of Des Moines v. Chicago and North Western Railway Co.*, 159 F. Supp. 223 (S.D. Iowa 1958); *Mobile & Gulf R.R. Co. v. Crocker*, 455 So.2d 829 (Ala. 1984); *Kansas City Area Transportation Authority v. Ashley*, 555 S.W.3d 9 (Mo. 1977);

Trustees of the Diocese of Vermont v. State, 496 A.2d 151 (Vt. 1985); *State of Vermont and Vermont Railway, Inc.*, 3 I.C.C.2d 903 (1987). Petitioner cited only cases where abandonment occurred after ICC permission, though in some of those cases the ICC permission was not discussed in the published opinion but could be found at the ICC. Petitioner cited below, and now cites, no case holding that a right-of-way for rail service subject to ICC jurisdiction can be abandoned by its railroad owner without ICC permission to terminate rail service.

In *Preseault v. ICC*, 494 U.S. 1 (1990) this Court noted that state law governing the disposition of reversionary interests in railroad rights-of-way was "subject of course to the ICC's 'exclusive and plenary' jurisdiction to regulate abandonments." *Id.* at 8 citing *Kalo*. In this case, the ICC, the District Court and the Tenth Circuit have merely applied the same "subject to" limitation when interpreting Section 912.

IV. This Court Should Not Consider Irrelevant and Unsubstantiated Factual Assertions Set Forth in the Petition

The proceedings below never resolved any of the disputed factual issues necessary for a court to infer that "use and occupancy" of the right-of-way for railroad purposes had ceased, despite respondents' denial of abandonment. The decisions of the ICC, the District Court and the Tenth Circuit are all based upon a single and undisputed factual determination: ICC permission to terminate service had never been granted. While the record in the proceedings below includes some evidence

properly presented by affidavit, the bulk of the "evidence" referred to in the petition consists only of petitioner's unsupported assertions or uncertified written materials attached to petitioner's pleadings and never authenticated as required by Rule 56(e), F.R. Civ.P.

The petition does not identify where the factual assertions made in the petition are found in the record. It even includes many statements of fact that could not have been in the record below because the "facts" asserted occurred (if at all) *after* the case had been decided. For example, the reference to a contract to sell the Aspen Branch and to a state court proceeding to prevent that sale are not supported in the record because both occurred after the District Court entered summary judgment. (Petition at 2) Petitioner's discussion of future plans for the right-of-way (Petition at 8) are irrelevant to the decisions in this case and have no support in the record below.

Petitioner's assertion that neither the ICC nor the District Court has adjudicated the facts concerning abandonment under either Section 912 or Section 10903 ignores the basis and clear language of both decisions. The ICC made the *factual* determination that the ICC had not granted approval under Section 10903 to abandon the Aspen Branch. That decision appears in the first paragraph of the ICC's decision. (Aplt. App. at 363) The ICC properly concluded that the fact that the ICC has not approved the abandonment of the right-of-way was "the only legally relevant consideration." (Aplt. App. at 368)

The "factual development" referred to in footnote 1 of the petition is irrelevant to the petition. Respondents

deny intending to abandon the right-of-way, deny that the condition of the right-of-way is sufficient to infer an intention to abandon and contend that the right-of-way has been used continuously for railroad purposes within the meaning of the 1875 Act and Section 912. Those contentions, and petitioner's counter-contentions, have not been tested below, because they are unnecessary to the decisions below.

The decisions of the ICC, the District Court and the Tenth Circuit merely hold that until the ICC has granted permission to cease rail service over a right-of-way under Section 10903, a court cannot declare that the right-of-way has been abandoned under Section 912. The exclusive jurisdiction of the ICC to protect the public by deciding if railroads should be allowed to cease service permanently would be eviscerated if railroads could voluntarily surrender, or be involuntarily stripped of, the rights-of-way necessary to continue the service before and without concern for ICC action.

CONCLUSION

For the reasons presented above, respondents request that the Court deny certiorari.

Respectfully submitted,

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APPENDIX A

16 U.S.C. § 1248(c)

(c) **Abandoned railroad grants; retention of rights**

Commencing upon October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in the Act of March 8, 1922 (43 U.S.C. 912), shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act.